Supreme Court, U.S.
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No. 94-548

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

PHILLIP W. KNIGHT,

Petitioner,

vs.

GEORGE MINGLEDORFF,
COMMISSIONER OF REVENUE FOR
THE STATE OF ALABAMA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CIVIL APPEALS OF ALABAMA

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 16 U.S.C. §831*l* prohibits the imposition of the Alabama Utility Gross Receipts Tax, §40-21-80, et seq., ALA. CODE 1975, on the Plaintiff's retail purchase of electricity from the City of Decatur when the electricity is purchased by the city from the Tennessee Valley Authority.

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STATEMENT OF THE CASE

The City of Decatur, Alabama, through its Utilities Board, distributes electricity to retail consumers in its geographic areas (North-Central Alabama) pursuant to a contract with the Tennessee Valley Authority, (TVA) which is a federally chartered corporation under **16 U.S.C. §831, et seq.**

The Plaintiff, Phillip Knight, is a retail purchaser of electric utility services from the City of Decatur. Each billing period there has been added to the Plaintiff's bill for electric services a charge of four percent (4%) of the amount of the bill. This additional charge represents the amount of the Alabama Utility Gross Receipts Tax, **§40-21-80, et seq.**, Ala. Code 1975, which is passed on by the City of Decatur to its customers as required by **§40-21-86**.

The Plaintiff brought this action, as a purported class action on behalf of himself and all others similarly situated (i.e. retail consumers of TVA supplied electricity) alleging that the taxation of the activity of he City of Decatur, in furnishing electricity under contract with TVA violates the tax exemption established in **16 U.S.C. §831*l***. The Plaintiff contended that **16 U.S.C. §831*l*** preempts the State from imposing any kind of tax on electricity generated. The Plaintiff argued in the trial court that his purchase of electricity from the City of Decatur is excluded from the "gross receipts" of the City of Decatur pursuant to **§40-18-83(1)** and excluded from the levy of tax. [This should be **§40-21-83(1)**].

The Plaintiff repeated his argument and contentions on appeal to the Alabama Court of Civil Appeals.

ARGUMENT

I. INTRODUCTION

The Petitioner, Phillip Knight, alleges two separate grounds for review of the decision rendered by the Alabama courts. The Petitioner alleges first that the decision in this case directly conflicts with a prior decision of the Alabama Supreme Court in construing 16 U.S.C. §831*l* in **Town of North Courtland v. Town of Courtland, 597 So.2d 1336 (Ala. 1992).** Second, the Petitioner alleges that the question raised involves an important federal question, wrongly decided by the Alabama court, which has not been, but should be decided by this Court. An examination of the alleged grounds for review reveals that neither of the alleged

grounds warrant granting the Petition for Writ of Certiorari.

The **Town of North Courtland** case, surpra, does not address the question raised by Plaintiff in the present case. Although unreported federal district court cases were cited in **Town of North Courtland** as authority for not allowing one municipality to impose a tax on another municipality operator, an electric utility on a non-profit basis pursuant to the TVA Act, there was no discussion concerning whether the utilities operated by the municipalities were a "franchise" of TVA and thereby exempt from all taxation pursuant to the last sentence of the first paragraph in **16 U.S.C., §831*l***.

In addition, the Alabama Utility Gross Receipts Tax does not impact the revenues of the utilities, nor TVA, because the tax is, like a sales tax,

required to be added to a retail purchaser's utility bill pursuant to §40-21-86, Ala. Code 1975. The law in Alabama is well established that the utility gross receipts tax is a direct tax levied on the consumer and not the utility. Therefore, the present case does not present a federal question sufficiently important to invoke the jurisdiction of this Court.

II. **THE DECISION OF THE ALABAMA COURTS DOES NOT DECIDE A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE DECISION OF ANOTHER STATE COURT OF LAST RESORT NOR A UNITED STATES COURT OF APPEALS.**

The Petitioner relies heavily upon the Alabama Supreme Court's decision in **Town of North Courtland v. Town of Courtland, supra**, for the proposition that the utility gross receipts tax found at **§40-21-80, et seq.** can not be levied upon the Petitioner. The **North Courtland** case and the decision of the

trial court in the present case do not conflict with each other. The **North Courtland** case is distinguishable because it involved the imposition of a municipal privilege license tax upon the gross receipts of a utility owned by the town of Courtland. The tax was imposed upon the furnishing of utility services in the town of North Courtland. The Alabama Supreme Court held that in ruling on a Motion For Summary Judgment, the trial court was justified in relying upon a federal district court's recognition that **16 U.S.C. §831*l*** prohibits a municipality from levying "a tax against another municipal corporation which operates an electric operation on a non-profit basis pursuant to the TVA Act." **597 So.2d 1336, 1338.**

However, the **North Courtland** case was remanded back to the trial court because of the possible requirement that

the Town of Courtland may be required to pay North Courtland a portion of revenues retained from its electric operations as being in lieu of taxes. **597 So.2d 1336, 1339-1340.**

The present case does not involve the imposition of a tax upon the revenues of the utility. Therefore, the issues raised in the **North Courtland** case are not applicable to the facts of the present case. Accordingly, the Petition for Writ of Certiorari should be denied.

III. THE DECISION OF THE ALABAMA COURTS DOES NOT PRESENT A FEDERAL QUESTION THAT WAS INCORRECTLY DECIDED.

The Petitioner alleges that the question presented to the Alabama courts involves an important federal question which was incorrectly decided. The Petitioner argues that the decision in this case incorrectly determined that the retail purchase of electricity by

the Petitioner was subject to the utility gross receipts tax found at §40-21-80, et. seq., Code of Alabama 1975.

With all due respect, the Order of the Montgomery County Circuit Court which was affirmed without opinion by the Alabama Court of Civil Appeals took into account prior decisions of the Alabama Supreme Court Court when it wrote at page 3 that:

> The Alabama Supreme Court has reaffirmed this principle several times, stating that ~~the utili~~ity gross receipts tax is a direct tax levied on the consumer and not the utility. See City of Birmingham v. Alabama Gas Corp., 564 So.2d 416, 417 (Ala. 1990); Ex parte White, 477 So.2d 422, 423-24 fn.2 (Ala. 1985).
> (Emphasis original)

The decision of the Circuit Court cited City of Birmingham v. Alabama Gas Corp., supra, for support in holding that the clear intent of the Alabama

Legislature was to impose the tax on the customers of all utilities in Alabama.

The Circuit Court decision also cited **Ex parte White, supra,** in holding that **§40-21-83(1)** provides an "exclusion" from tax which has been characterized as exempting certain uses of electricity from tax. The Court concluded that the exclusion in **§40-21-83(1)** excludes utility services that are provided to the federal government.

The Petitioner argues that the decision of the Alabama Courts conflicts with **M'Culloch v. Maryland, 17 U.S. (4 Wheat) 316, 4 L.Ed. 579 (1819)** because the utility gross receipts tax unlawfully taxes the <u>income</u> of the Tennessee Valley Authority, an agency of the United States. (See Petition for Writ of Certiorari, pages 4-5). As previously stated herein, the trial

court held that the tax under §40-21-80, et seq., is imposed on customers of the utilities in Alabama, and not the utility nor TVA. In fact, the Court held that the furnishing of utility services to the federal government is excluded from tax. Therefore, the income of TVA is not subject to the tax as argued by the Petitioner.

Although Plaintiff cites **Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984)** as support for his argument that the Alabama Utility Gross Receipts Tax is actually levied upon the utility, this Court held that wholesalers had standing to challenge the discriminatory tax because it had an adverse competitive impact on their business. The tax discriminated on its face against interstate commerce and clearly the

wholesalers had standing to challenge the tax in this Court.

However, in the present case, the utilities are not in the same position as the wholesalers in **Bacchus**. The utilities are not required to pay the gross receipts tax if their retail customer fails to pay the bill. Section **40-21-85** incorporates **§40-23-8** into the provisions of the Utility Gross Receipts Tax which only requires the tax to be paid on cash sales and credit collections made during the month. The utility is only liable if it fails to add the tax to the sale price of the utility services.

In **Tennessee Electric Power Company v. Tennessee Valley Authority, 306 U.S. 118, 59 S.Ct. 366 (1979)** this Court characterized the purchasers of electricity from TVA as vendees of TVA and not as franchisers or franchisees.

This Court described the right conferred upon TVA as a right to exist as a corporation and to improve navigation and control flood waters along the Tennessee River by developing a series of dams for flood control and to sell the electrical power created from the erection of the dams. It is submitted that the right to do these things is the "franchise" that was conferred upon TVA by Congress and which is exempted from tax in **16 U.S.C., §831*l***.

Likewise, the State also has authorized the incorporation of nonprofit entities to exist as public utilities and to contract with TVA to purchase and resell electrical energy. This is the type of franchise that has been granted by the State to entities such as the Defendants in the present case. **See Tennessee Electric Power Company v. Tennessee Valley Authority,**

306 U.S. at p. 139-141, 59 S.Ct. at p. 370-371, discussing the term franchise and certain Alabama Acts.

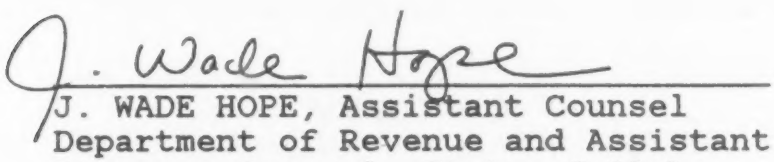
It is submitted that the trial court and the Court of Civil Appeals decision properly refused to characterize the Decatur Utilities Board as a franchise or franchisee of TVA.

CONCLUSION

Phillip Knight has petitioned this Court for Writ of Certiorari asserting two grounds for review, neither of which warrant the issuance of a Writ of Certiorari. This case (and the statutes involved) was correctly decided by the Montgomery County Circuit Court and the Court of Civil Appeals. In addition, the prior decision cited by Petitioner, as being in conflict with this case, does not involve the same issues as are present in this case. The Alabama gross

receipts tax is imposed upon the retail customers (ultimate consumer) of utilities. It is not imposed upon the utility that purchases electricity from TVA nor TVA. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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